

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOTICE OF APPEAL TO THE

APPELLEES, : /

v.

No. 21182

UNITED STATES OF AMERICA

Appellee : /

APPELLEE'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

ARTHUR E. MILLER, JR.
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United States Courthouse
San Diego, California 92101

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILTON ADOLPHUS FARRELL,

Appellant, :

v. : No. 21182

UNITED STATES OF AMERICA, :

Appellee. :

JURISDICTION

The district court had jurisdiction of this case pursuant to 8 U.S.C., Section 1329, and 18 U.S.C., Section 3231.

After waiver of indictment, an information was filed in the district court charging appellant with a violation of 8 U.S.C., Section 1326, to which he entered a plea of "not guilty", and upon which he was tried, found guilty by jury verdict, and judgment entered against him.

Jurisdiction of this Court on appeal is predicated upon 28 U.S.C., Section 1291.

ARGUMENT

Although appellant's brief does not contain a specification of errors set out separately and particularly, it appears that such a specification would have included the points set forth in the sub-headings of appellant's argument therein and will be treated as such herein.

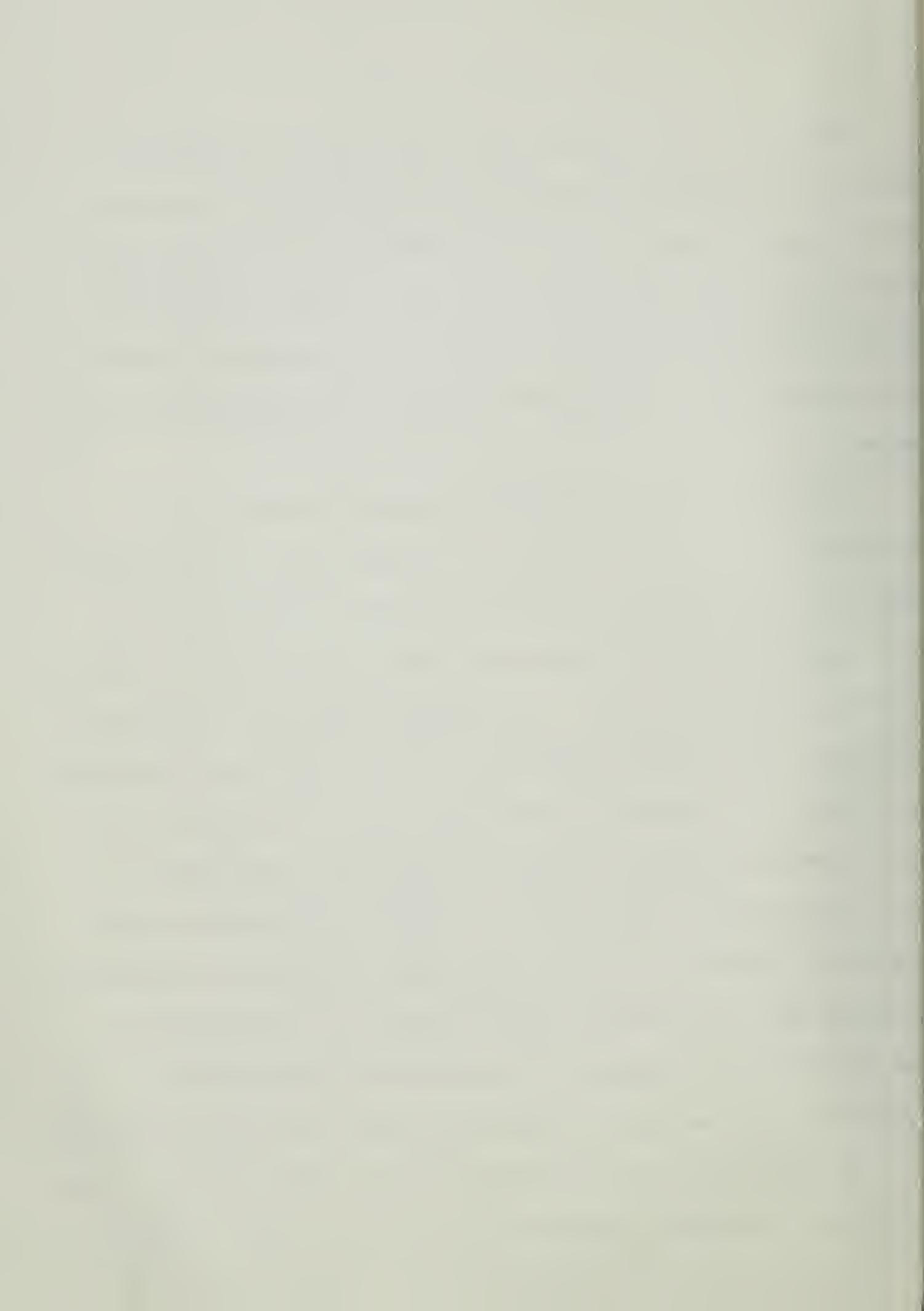


I.

Appellant first contends that the government failed to prove that appellant's parents were not citizens or nationals of the United States and that the government was thereby precluded from proving that appellant was an alien. It is submitted (1) that the government proved that appellant's parents were not citizens or nationals, and, (2) that appellant was an alien.

In support of his contention, appellant relies on the testimony of his witness Carolina Mouritzen that she could not come to a determination of citizenship from examining Exhibit 1-A, appellant's birth certificate which was received in evidence without objection (Tr. 9). It is apparent from Mrs. Mouritzen's testimony that she was referring to the citizenship of appellant, not that of his parents, as reflected on line 24, page 42, of the transcript where she refers to "the child" designated in such certificate. No questions were put to her concerning the appellant's parents or their citizenship. Inasmuch as appellant's alienage was the paramount issue at trial, it is obvious that she was called to testify on this point and was referring to the appellant's citizenship in testifying about his birth certificate.

Exhibit 1-A on its face shows that appellant's parents were both born in Barbados, British West Indies (Tr. 23). Exhibit



1-B, the order of U. S. District Judge Homer Thornberry of the U. S. District Court for the Western District of Texas, recites that appellant's mother and father were aliens at the time of his birth (Tr. 23).^{1/} In Exhibit 1-E, the extra-judicial typewritten statement taken from appellant, he states that both his parents were born in and citizens of the British West Indies (Tr. 28, 29).^{2/} Exhibit 1-F, another statement by appellant, contains similar declarations (Tr. 36).^{3/} Appellant now contends that these statements by appellant as to his parents' alienage, which were introduced without objection, are incompetent evidence to prove such facts because they are hearsay and conclusions. "The extrajudicial statements of a party to the action, civil or criminal, are binding upon him and substantive evidence against him." Gonzales v. Landon, 215 F.2d 955, 957 (C.A. 9, 1954), rev'd. on other grounds, 350 U.S. 920. See also Wong Ken Foon v. Brownell, 218 F.2d 444 (C.A. 9, 1955); IV Wigmore, Evidence, sec. 1050 (1940 ed.). Here the appellant was stating facts as to a matter of pedigree as to his own parents. An alleged alien's own declarations may be admissible.

1/ The admissibility of Exhibit 1-B is considered in section II, infra.

2/ The admissibility of Exhibit 1-E is considered in section III, infra.

3/ The admissibility of Exhibit 1-F is considered in section III, infra.

sible to establish alienage. 3 C.J.S., Aliens, sec. 3(c). See also Young Ah Chor v. Dulles, 270 F.2d 338, 343-345 (C.A. 9, 1959); United States v. Mid-Continent Petroleum Corporation, 67 F.2d 37, 45 (C.A. 10, 1933), cert. denied, Hosey v. Mid-Continent Petroleum Corporation, 290 U.S. 702.

With respect to the alienage of appellant himself, the government introduced into evidence Exhibit 1-A, the certificate showing appellant's place of birth in the Canal Zone; Exhibit 1-C, the decision of the Special Inquiry Officer concluding that appellant was an alien; Exhibit 1-D, the decision and order of the Board of Immigration Appeals affirming the findings of the Special Inquiry Officer and dismissing appellant's appeal; and Exhibit 3, the copy of a conviction of appellant in the U. S. District Court for the District of Arizona on the same charge which he faced in the present case.

It is submitted that the evidence was clear and uncontradicted that appellant's parents were aliens at the time of his birth and that appellant was also an alien at the times specified in the exhibits referred to directly above. Once established, a person's status as an alien is presumed to continue until the contrary is shown. Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1880); Ng Kam Fook v. Esperdy, 320 F.2d 86 (C.A. 2, 1963), cert. denied, 375 U.S. 955; United States v. Day,

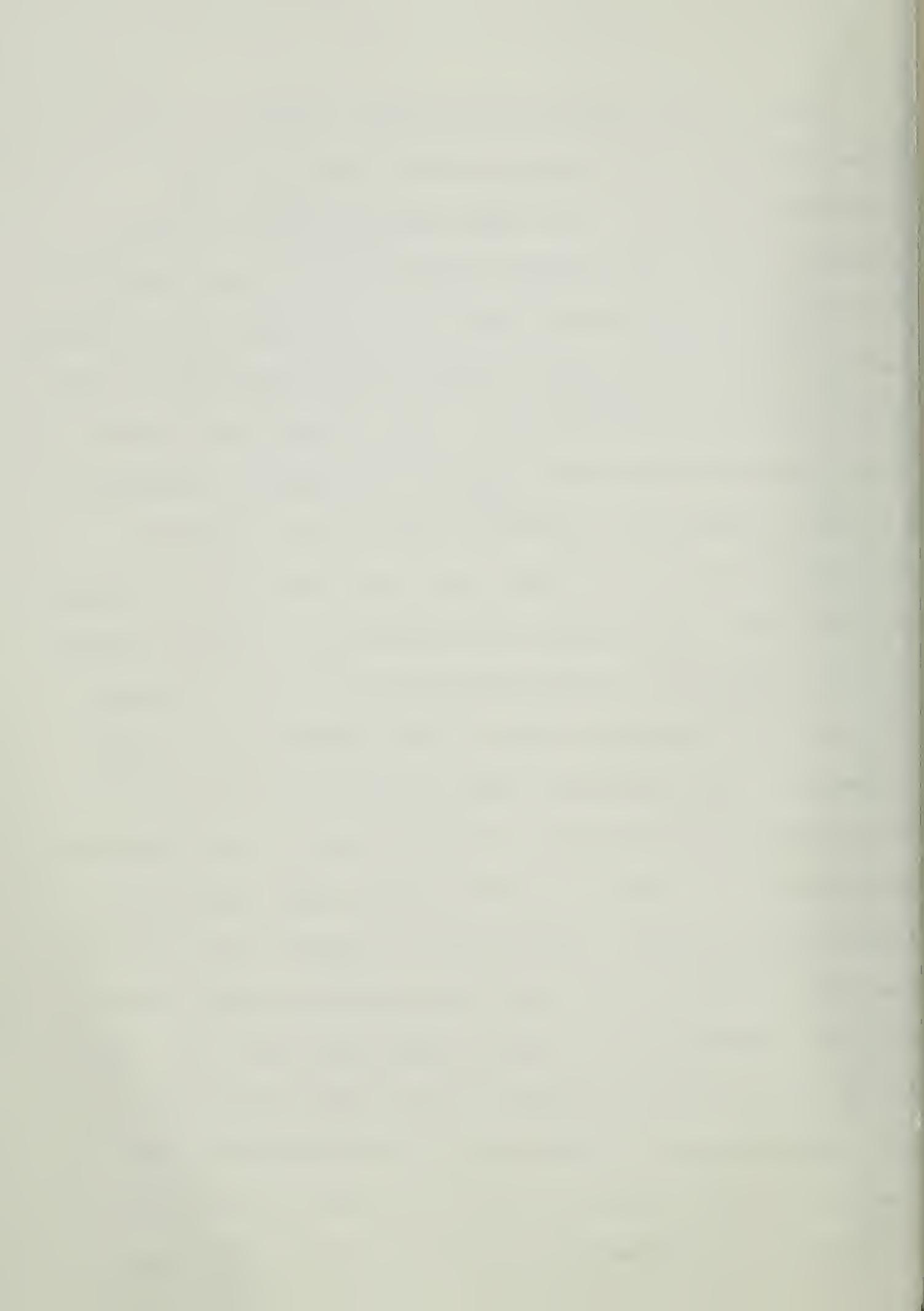
4 F.2d 336 (C.A. 2, 1931); Mills v. United States, 273 Fed. 25 (C.A. 9, 1921). No evidence whatsoever was introduced or developed by appellant to rebut this presumption. It was therefore not incumbent upon the government, as now contended by appellant, to prove affirmatively that appellant and his parents never became citizens of the United States.

III.

Appellant contends that the lower court erred in receiving into evidence Exhibit 1-B, the copy of the order by Judge Homer Hornberry of the U. S. District Court for the Western District of Texas in a habeas corpus proceeding instituted by appellant. A similar contention is made with respect to Exhibit 1-D, the decision and order of the Board of Immigration Appeals in deportation proceedings involving appellant. The introduction of both documents was objected to at the trial (Tr. 10, 12) on the grounds of hearsay and lack of authentication thereof. Both documents were received by the court as business records of the Immigration and Naturalization Service. Exhibit 1-B was also judicially noticed by the court (Tr. 23).

Both of these documents were produced at trial from Exhibit 1, an Alien Registration File of the Immigration and Naturalization Service pertaining to appellant.

Exhibit 1 was introduced through the testimony of Mr. Truman LeFors, an investigator for the Immigration and Naturalization Service with thirty years experience in the Service (Tr. 6). He testified that the file was made and kept in the regular and ordinary course of the business of the Service and that such a file was for a person having any material transactions with the Service (Tr. 6). It is obvious that such an Alien Registration file must include all documents relating to an alien's immigration, exclusion, deportation, expulsion, naturalization, place of birth, age, race, nationality, citizenship and other items bearing on his status as an alien in order that the Immigration and Naturalization Service can discharge its duties and responsibilities in the administration and enforcement of the immigration laws of the United States. It would of course be necessary to include therein such a document as Exhibit 1-B, a copy of a federal court order adjudicating issues as to an alien's deportability. Without such a document, the alien's actual status could very possibly be quite different than that reflected in his Alien Registration file. Mr. LeFors did in fact testify that Exhibit 1-B was kept in the regular and ordinary course of Immigration and Naturalization Service business (Tr. 9). The fact that the document was not written or prepared by personnel of the Service is not an obstacle to

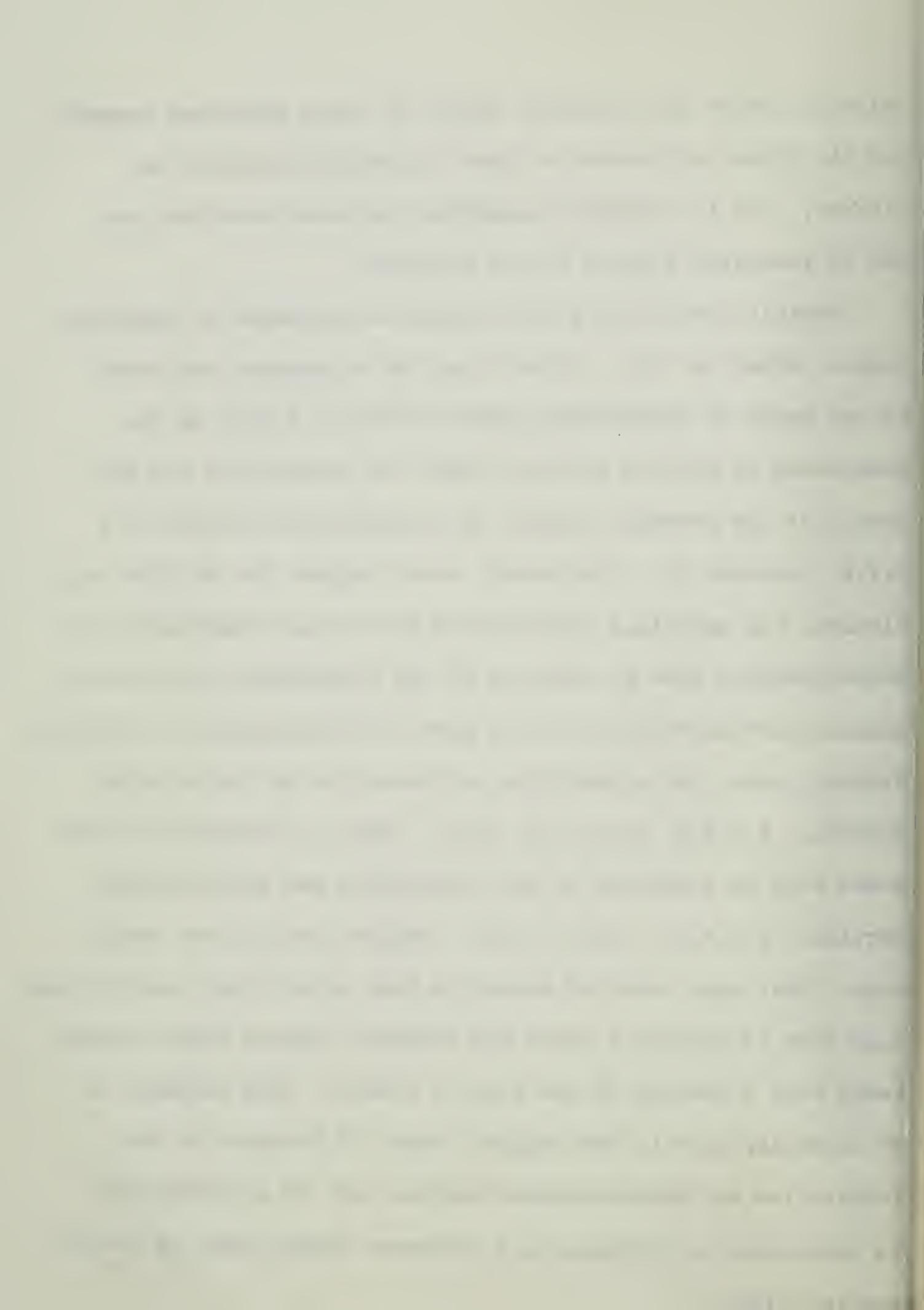


its reception under 28 U.S.C., Section 1732. See LaPorte v. United States, 300 F.2d 878 (C.A. 9, 1962) (form prepared by person outside the Selective Service System which was in the defendant's draft file held admissible under 28 U.S.C., Sections 1732 and 1733); United States v. Fluckey, 19 F.2d 64 (C.A. 6, 1927) ("landing certificate" made out by steamship company and delivered to immigration authorities held admissible as an official record kept in the due performance of public business).

In addition, Exhibit 1-B was received by the lower court as being judicially noticed (Tr. 23). Such a document may be the subject of judicial notice by a federal court. See Wells v. United States, 318 U.S. 257, 260 (1943) (holding federal court may judicially notice habeas corpus proceedings brought by same petitioner in other federal court); St. Paul Fire & Marine Insurance Co. v. Cunningham, 257 F.2d 731 (C.A. 9, 1958) (this court took judicial notice of records of a California county court and state District Court of Appeal); Lambert v. Conrad, 308 F.2d 571 (C.A. 9, 1962) (holding records of other courts in related proceedings may be judicially noticed); Lopez v. Swope, 205 F.2d 8, 9 fn. 2 (C.A. 9, 1953) (this Court took judicial notice of the official records of the U. S. District Court for the Western District of Washington in an appeal from the Northern District of California); Smith v. Settle, 212 F.Supp. 622 (W.D. Mo. 1962)

(district court took judicial notice of prior published reports and the files and records of cases in which petitioner had figured). It is therefore submitted the lower court did not err in receiving Exhibit 1-B in evidence.

Exhibit 1-D is not a court order as contended by appellant (Appts. Brief, p. 11). It is a copy of a decision and order of the Board of Immigration Appeals which is a part of the Department of Justice directly under the supervision and direction of the Attorney General and established pursuant to 8 C.F.R., Section 3.1. The Board, under subpart (b) of this regulation, has appellate jurisdiction over various decisions and determinations made by officers of the Immigration and Naturalization Service which is also a part of the Department of Justice directly under the supervision and direction of the Attorney General. 5 U.S.C. secs. 342, 342b. Copies of decisions of the Board must be submitted to the Immigration and Naturalization Service. 8 C.F.R., sec. 3.1 (f). Exhibit 1-D is just such a copy. This copy would of course be kept in an Alien Registration file such as Exhibit 1 since the contents thereof would undoubtedly have a bearing on the alien's status. This document is of necessity kept in the regular course of business of the Immigration and Naturalization Service and, it is submitted, is admissible in evidence as a business record under 28 U.S.C., Section 1732.



It was not necessary, as contended by appellant, that Exhibits 1-B and 1-D be authenticated pursuant to Rule 27, Federal Rules of Criminal Procedure, and Rule 44(a), Federal Rules of Civil Procedure, inasmuch as Rule 44(c), Federal Rules of Civil Procedure provides that Rule 44 "does not prevent the proof of official records * * * by any other method authorized by law."

III.

Appellant's final contention is that Exhibits 1-E and 1-F, both of which are typewritten statements taken from appellant by Immigration and Naturalization Service personnel and signed by appellant, were introduced into evidence in violation of appellant's rights under the Fifth Amendment to the Constitution of the United States. Appellant's argument on this point is untenable.

No claim is made by appellant concerning the voluntariness of these statements. Appellant's whole argument is that the statements and the manner in which they were obtained do not satisfy the strict requirements laid down by the Supreme Court of the United States in Miranda v. Arizona, 384 U.S. 436 (1966). However, subsequent to the Miranda decision, the Supreme Court, in Johnson v. New Jersey, 384 U.S. 719 (1966), held that the guidelines set forth in Miranda are not applicable to cases

the trial of which began prior to the date of the decision. Since Miranda was decided on June 13, 1966, and the trial of the case at bar began and was concluded on January 28, 1966, the Miranda requirements are not applicable and appellant's argument must fail.

This Court has recently recognized the inapplicability of Miranda in such situations: McGarrity v. Wilson, 368 F.2d 677 (C.A. 9, 1966); Collins v. Wilson, 368 F.2d 995 (C.A. 9, 1966); Doran v. Wilson, 369 F.2d 505 (C.A. 9, 1966); Spigner v. United States, 369 F.2d 686 (C.A. 9, 1966).

CONCLUSION

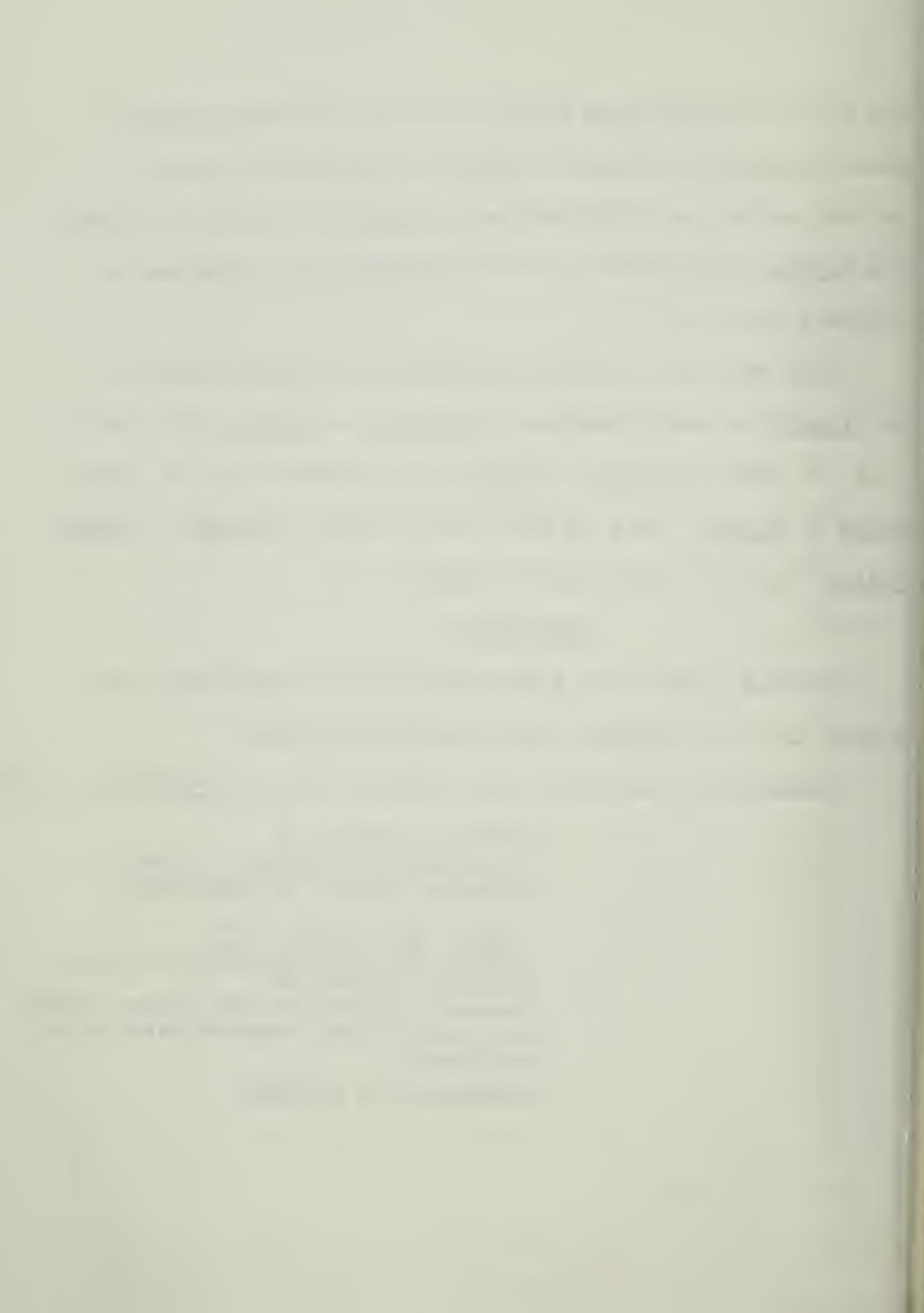
For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted this 14th day of February, 1967.

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Special Assistant to the United States
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California

ATTORNEYS FOR APPELLEE



C E R T I F I C A T I O N

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Arthur W. Ayers, Jr.

ARTHUR W. AYERS, JR.

Special Assistant to the United States Attorney for the Southern District of California



FOR THE NINTH CIRCUIT

ELTON ADOLPHUS FARRELL,)
)
 Appellant,)
)
)
 --vs--
UNITED STATES OF AMERICA,)
)
 Appellee. }
)

No. 21181AFFIDAVIT OF SERVICEBY MAIL

UNITED STATES OF AMERICA)
)
) ss.
SOUTHERN DISTRICT OF CALIF.)

Dorothy V. Weir, being first duly sworn,
poses and says:

That she is a citizen of the United States and a resident
San Diego County, California; that her business address is
5 West "F" Street, San Diego, California; that she is over
the age of eighteen years, and not a party to the above-
titled action;

That on February 14, 1967 she deposited in the
United States Mails, San Diego, California, in the above-
titled action, in an envelope bearing the requisite postage,
copy of APPELLEE'S BRIEF

Addressed to Mr. Frederick Barak, Attorney at Law

800 No. Highland Ave., Hollywood, Calif. last known address, at

90028

in which place there is a delivery service by United States Mails
from said post office.

SUBSCRIBED and SWORN to before me, William W. Luddy

this 14th day of February, 1967.

WILLIAM W. LUDDY, Clerk, U.S. District Court

Southern District of California

